

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

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|--|---|---------------------------|
| Kevin White, #278568, |) | C/A NO. 9:07-2185-CMC-GCK |
| |) | |
| Plaintiff, |) | |
| |) | OPINION and ORDER |
| v. |) | |
| |) | |
| Tonya Miller, Lieutenant at Kershaw |) | |
| Correctional Institution; H. Smith, |) | |
| Lieutenant at Kershaw Correctional |) | |
| Institution; NFN Washington, Major at |) | |
| Kershaw Correctional Institution; |) | |
| NFN Clee, Sergeant at Kershaw |) | |
| Correctional Institution; NFN Miller, |) | |
| Sergeant at Kershaw Correctional |) | |
| Institution; NFN Powell, Officer at |) | |
| Kershaw Correctional Institution, |) | |
| NFN Thompson, Lieutenant at Kershaw |) | |
| Correctional Institution; NFN Dubose, |) | |
| Captain at Kershaw Correctional Institution, |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

This matter is before the court on Plaintiff's *pro se* complaint, filed in this court pursuant to 42 U.S.C. § 1983.

In accordance with 28 U.S.C. § 636(b) and Local Civil Rule 73.02 (B)(2)(d), DSC, this matter was referred to United States Magistrate Judge George C. Kosko for pre-trial proceedings and a Report and Recommendation ("Report"). On May 29, 2008, the Magistrate Judge issued a Report recommending that this matter be dismissed for failure to exhaust administrative remedies or, in the alternative, that Defendants' motion for summary judgment should be granted. The Magistrate Judge advised Plaintiff of the procedures and requirements for filing objections to the Report and the serious consequences if he failed to do so. Plaintiff filed objections to the Report on June 5, 2008.

The Magistrate Judge makes only a recommendation to this court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the court. *See Mathews v. Weber*, 423 U.S. 261 (1976). The court is charged with making a *de novo* determination of any portion of the Report of the Magistrate Judge to which a specific objection is made. The court may accept, reject, or modify, in whole or in part, the recommendation made by the Magistrate Judge or recommit the matter to the Magistrate Judge with instructions. *See* 28 U.S.C. § 636(b). The court reviews the Report only for clear error in the absence of an objection. *See Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005) (stating that “in the absence of a timely filed objection, a district court need not conduct a *de novo* review, but instead must only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.”) (citation omitted).

After reviewing the record of this matter, the applicable law, the Report and Recommendation of the Magistrate Judge, and Plaintiff’s objections, the court agrees with the conclusions of the Magistrate Judge. Accordingly, the court adopts and incorporates the Report and Recommendation by reference in this Order. Plaintiff’s complaint is defective for failure to exhaust administrative remedies. However, even if Plaintiff were to properly exhaust his administrative remedies and return to this court, he cannot overcome Defendants’ motion for summary judgment.

Rule 56(e) provides that as Defendants have made a properly supported summary judgment motion, Plaintiff “may not rely merely on allegations or denials in [his] own pleading; rather [his] response must—by affidavits or as otherwise provided in this rule—set out *specific facts* showing a genuine issue for trial.” Fed. R. Civ. P. 56(e)(2). Plaintiff’s “affidavit” in opposition to Defendants’ motion, more correctly characterized as a declaration submitted under 28 U.S.C. § 1746, not only

reasserts the allegations made in Plaintiff's complaint, but also is filled with and reliant upon hearsay.

Therefore, Defendants' motion for summary judgment is **granted** and this matter is dismissed with prejudice.

IT IS SO ORDERED.

s/ Cameron McGowan Currie
CAMERON MCGOWAN CURRIE
UNITED STATES DISTRICT JUDGE

Columbia, South Carolina
June 11, 2008

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